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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91206251
Party	Plaintiff Elevation Management, LLC
Correspondence Address	ROCHELLE D ALPERT MORGAN LEWIS & BOCKIUS LLP ONE MARKET, SPEAR STREET TOWER SAN FRANCISCO, CA 94105 UNITED STATES ralpert@morganlewis.com, sftrademarks@morganlewis.com, jrubel@morganlewis.com, shall@morganlewis.com,ylolua@morganlewis.com
Submission	Reply in Support of Motion
Filer's Name	Rochelle D. Alpert
Filer's e-mail	ralpert@morganlewis.com, shall@morganlewis.com, sftrademarks@morganlewis.com
Signature	/RDA/
Date	07/01/2013
Attachments	Opposer's Reply iso Motion for Summary Judgment - Opp # 91206251 (Appendix A).pdf(581274 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Application Serial No. 85/171,899
Filed November 8, 2010
For the mark **THE ELEVATION GROUP**
Published in the OFFICIAL GAZETTE on April 3, 2012

ELEVATION MANAGEMENT, LLC, Opposer, v. FINISH STRONG VENTURES, INC., Applicant.	Opposition No. 91,206,251

OPPOSER'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56 and T.B.M.P. § 528, Opposer Elevation Management LLC ("Elevation" or "Opposer") files this reply in support of its Motion for Summary Judgment to deny the above-referenced application for the THE ELEVATION GROUP designation, filed on November 8, 2010 by Applicant Finish Strong Ventures, Inc. ("Finish Strong" or "Applicant"). Elevation's motion continues to be warranted based on Applicant's lack of use in commerce of the applied-for THE ELEVATION GROUP designation for any online educational services as of the Application's filing date — November 8, 2010. The undisputed specimen submitted for the application is a web site printout bearing the electronic date "11/8/2010" and the unambiguous words "Coming soon."

Applicant does not, because it cannot, dispute in its Opposition that the specimen provided to the Board was a screenshot captured from its web site as of the date of the Application's filing. Opp. at 5 ("[C]ounsel accessed the website and printed a screen shot..."). Instead, Applicant seeks to muddy the waters in a flawed attempt to create a disputed issue of material fact, alleging supposed credibility issues and relying on a self-serving declaration filled

with inadmissible and simply irrelevant statement designed to obfuscate the single issue before the Board — Applicant's lack of an actual offering of the applied-for online educational services at the time of filing its use-based application. Revealingly, Applicant does not come forth with a screenshot of any web site educational services offering on or before November 8, 2010. Thus, Applicant's attempts to create a disputed issue of material fact simply do not withstand scrutiny.

While Applicant attempts to refer to additional documents, none demonstrate any content offering and/or is authenticated as in use on or before November 8, 2010. Applicant relies on non-content screenshots with typewritten (not electronic) dates and/or no URLs, broadly elaborating in the declaration that these "screens appeared in 2010." Dillard Decl. ¶8. Thus, the screenshots have not been properly authenticated. T.M.B.P. § 528.05(e). In all events, these improperly authenticated documents fail to demonstrate use of the mark for the applied-for services on or before the filing date of the Application at issue, or even to create a material issue of disputed fact. They represent at best promotional activities, not proof of any offering of the services this Application covers.

In a last ditch effort, Applicant attempts to argue that somehow its conduct is excused because the service description for the Application changed during prosecution. This argument, too, stands as fatally flawed. There is no excuse for a flawed specimen based on a changed services description. It is axiomatic that you can only narrow, not expand, the services described in the initial application. T.M.E.P. § 1402.06; 37 C.F.R. § 2.71(a). In all events, the specimen submitted demonstrates only undefined services, available sometime in the future.

The only evidence properly of record demonstrates lack of use: the specimen that counsel for Applicant filed with the Trademark Office in an Application under counsel's signature, which bears the electronic date "11/8/2010," and unequivocally states "Coming soon." Alpert Decl. Ex. C. Thus, based on the only admissible evidence of record, summary judgment is appropriate.

I. SUMMARY JUDGMENT IN FAVOR OF OPPOSER IS REQUIRED ON THE RECORD BEFORE THE BOARD.

A. Applicants Have Failed to Meet Their Burden to Create a Disputed Issue of Material Fact, Requiring Summary Judgment in Opposer's Favor.

When, as here, the moving party supports its motion with evidence, the non-moving party must come forward with cognizable evidence to create a disputed issue of material fact. The non-moving party may not rest on mere denials or conclusory assertions, but must proffer countering, admissible evidence demonstrating that there is a genuine material, factual dispute. Fed. R. Civ. P., Rule 56(e) (adverse party "must set forth specific facts showing that there is a genuine issue for trial").

The Board should not consider, and indeed should properly strike from the record, inadmissible statements and documents Applicant sets forth to support its Opposition. *See* Fed. R. Civ. P., Rule 56 (e); *BL Cars Ltd. v. Puma Industria de veiculos S/A*, 221 U.S.P.Q. 1018, 1019 (TTAB 1983) (factual statements could not be considered in the absence of properly submitted evidence to support them). An affidavit submitted in support of, or in opposition to, a motion for summary judgment must, among other requirements, set forth facts as would be admissible in evidence. T.B.M.P. § 528.05(b). Attached as Appendix A is a specification of Applicant's deficient, proffered statements and documents, along with the evidentiary objections why each should not be considered and should be stricken from the record.

Regardless of the ultimate admissibility of these proffered statements and documents, however, the same conclusion applies. This motion for summary judgment should be granted, since none of the materials, admissible or not, demonstrate use of the mark in connection with an offering of the applied-for online educational content services as of the Application date.

B. Elevation Is Entitled to Summary Judgment on the Ground that Applicant Lacked the Requisite Use in Commerce of the Applied-for Mark.

In response to Elevation's Motion for Summary Judgment, Applicant does not dispute the accuracy of the evidence presented by Elevation: Applicant's own alleged specimen of use representing that services were "Coming soon," electronically dated November 8, 2010. Furthermore, Applicant provides not a single piece of admissible evidence to establish that it was actually using the applied-for designation in commerce for the online educational content applied for, on or before the application date of November 8, 2010, which is fatal to its Opposition.

1. Applicant's Specimen Demonstrates No Use of the Designation in Connection with Educational Services as November 8, 2010

The evidence Elevation relies to support its Motion for Summary Judgment is comprised of Applicant's own specimen of use, dated November 8, 2010, submitted that same day in support of Applicant' use-based Application. In its response, Applicant attempts to misleadingly re-frame Opposer's motion as "simply conclud[ing] from the 'fact' that the specimen was flawed that Finish Strong, as a matter of law, cannot prove it was actually using the Mark in connection with its designated services as of the date of the Application." Opp. at 2. While the specimen is indeed flawed, as Applicant concedes, it is probative of Applicant's non-use of the mark, because on its face it reveals that services were not yet being offered with its simple statement of "Coming soon." In all events, Applicant in response has not come forth with proof of use for any actual online educational content offering to the public under the applied-for service designation, but at best only continues to rely on promotional activities as somehow substantiating use as of November 8, 2010.

Significantly, Applicant's Opposition admits that the specimen submitted is a screenshot of The Elevation Group's official web site *on the day of filing.*[1] Opp. at 5. Applicant's own description of how the specimen was obtained only confirms the strength of the specimen as evidence that the mark was not yet used in connection with online educational services. *Id.* The web site printout as of November 8, 2010 categorically demonstrates that there was no content being offered, since it states only "Coming soon."

2. Applicant Has Proffered No Evidence of Use of the Mark as a Service Mark Before the Filing Date; Applicant's Evidence Demonstrates Only Purely Promotional Use.

Applicant fails to provide any evidence that online educational content of the type noted in its Application was publicly available on or before November 8, 2010. Instead, Applicant proffers a list of promotional uses of the applied-for designation (and different designations) in the lead-up to an admitted future "public launch" of the service, and summarily concludes it has use as a service mark, without any supporting case law or statutory authority. Because Applicant provides no evidence showing it used the applied-for designation in connection with any online educational content at the time the Application was filed, Applicant has failed to establish a genuine issue of material fact precluding summary judgment here.

As discussed in Elevation's opening brief, an application is void *ab initio* if the applied-for mark was not in use in commerce at the time of the filing of an application. *See* Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a); *Intermed Communications, Inc. v. Chaney*, 197 U.S.P.Q. 501 (T.T.A.B. 1977) (application void where the mark had not been used prior to the filing date in association with the services described in the application). Advertising, promotion and preparatory activities for services before the services are available do not support a use-

[1] Applicant's then-attorney signed the application, contrary to Applicant's declaration, paragraph 12, which states the attorney submitted *Mr. Dillard's* "statement of use attesting to" Finish Strong's use of the applied-for designation in commerce since at least October 22, 2010.

based registration. *In re Port Auth. of N.Y.*, 3 U.S.P.Q.2d 1453 (T.T.A.B. 1987); *The Greyhound Corporation, et. al. v. Amour Life Insurance Company*, 24 U.S.P.Q. 473 (T.T.A.B. 1982). In order for the use requirement to be met, there must be "an open and notorious public offering of the services to those for whom the services are intended." *Aycock Eng'g Inc. v. Airflite, Inc.*, 560 F.3d 1350, 1359 (Fed. Cir. 2009).

While Applicant's self-serving, conclusory statements and documents for the most part are inadmissible as set forth in Appendix A hereto, even if deemed admissible, a review of Applicant's allegations regarding supposed use of the designation on or before November 8, 2010 only confirms lack of use. All of the proffered statements and documents demonstrate only advertising, promotional and/or preparatory uses of the applied-for designation without showing any use in connection with any *offered* applied-for services.

To begin with, Applicant claims that "In order to [conduct webinars, and host and provide other educational services] we constructed and introduced a website . . . to host, promote, advertise, and provide the webinars and services." Dillard Decl., ¶ 4. 2010. Applicant does not ascribe a date to these activities. Indeed, creating a web site in order to offer a service at some point in the future does not prove use for any type of service, let alone the applied-for online educational content services.

Applicant goes on to describe an October 22, 2010 "private beta-launch" allegedly conducted "to gauge public interest." Dillard Decl., ¶ 5-7, Exs. A-B. Yet, Applicant fails to present any evidence of the requisite use of the mark in commerce for online educational content of the type for which Applicant applied in the "private beta-launch." The only documentation offered in regards to a "private beta launch" (*Id.* at Ex. B, screenshot 2) are documents with no online educational content displayed. *Id.* Applicant fails to demonstrate the "private beta launch" involved any use of the mark in connection with online educational content of the type at

issue here. Indeed, the record is entirely silent as to *actual content, if any,* that allegedly was available as part of the so-called "private beta launch."

In its Response, Applicant claims Mr. Dillard's declaration "authenticates documents — specifically, correspondence and screen shots of pages from the beta website launch in October 2010" as evidence that the website "as of October 22, 2010 . . . prominently featur[ed] the Mark in connection with the services offered, promoted, and advertised on the beta." Opp. at 11 (Emphasis added). Each of these so-called "pages from the beta website launch," however, at best represents promotional efforts for an offering in the future — not a *single* page demonstrates use of the mark for any online educational services. *See* TMEP § 1301.04(b) and cases cited therein. *See also In re Universal Oil Products Co.*, 476 F.2d 653 (C.C.P.A. 1973). As discussed, promotional activities without offering the service — which is what each document at best shows – do not constitute use as a service mark and do not support a use-based application.

First, Applicant points to a supposed October 21, 2011 "email blast" announcing a beta test in the future. Dillard Decl., ¶ 6, Ex. A. This is clearly and unequivocally a promotional use relating to a service not yet available. In addition, printed publications (including internet materials) are only admissible for what they show on their face, not as proof of any facts asserted therein. T.B.M.P. §§ 528.05(e), 708; *Safer, Inc. v. OMS Investments, Inc.*, 94 U.S.P.Q.2d 1031 (T.T.A.B. 2010). Accordingly, the email does not prove a beta test actually occurred on October 22, 2010, nor what the beta test actually included, in terms of content and/or services.

Second, Applicant attempts to proffer "true and correct copies of three (3) additional screen captures from our The Elevation Group website as those screens appeared in 2010." Dillard Decl. ¶ 8, Ex. B. Applicant does not even attempt to authenticate these documents with a specific date or to begin to meet the requirements for the admissibility of printed publications as

required by TBMP § 528.05(e) (no location source or URL, no electronic date, and no description as to how or when accessed). Thus, on this ground alone, these documents cannot demonstrate the offering of online educational services on or before November 8, 2010. Regardless of Applicant's insufficient authentication, however, *all three* documents comprising Exhibit B fail to demonstrate any online educational service content of the type applied-for in connection with any mark, let alone the applied-for mark.

The first screenshot of Exhibit B shows, according to Mr. Dillard's own declaration, "advertised prices for subscription memberships." Dillard Decl. ¶ 9 (Emphasis added). This advertisement nowhere indicates that any services were currently offered, nor their nature. Dillard Decl., Ex. B, screen shot 1. The second screen shot suffers the same fatal flaw *and* appears to be falsely characterized as "EVG Website from Oct 2010." *Id.*, Ex. B, screen shot 2. The typed date on the document contradicts the statements made in the document and in Applicant's own declaration. The page references a beta test apparently from "two weeks" earlier and Applicant describes the document as dated "two weeks" after the beta test. *Id.*; Dillard Decl. ¶ 9. This necessarily means the screenshot is from November 2010 – assuming the so-called "private beta launch" occurred as Applicant claims in the declaration on October 22, 2010 — rendering the date typewritten on the document at best misleading and at worst false. Even assuming this document was actually published in October 2010 as the typewritten indication notes, it references only a *future* 24-hour round of a "private beta launch," without specifying any online educational services offered at that time. Dillard Decl., Ex. B, screen shot 2. Again, this document does not and cannot substantiate in any way that any such future test offering actually occurred. *See* T.B.M.P. §§ 528.05(e), 708; *Safer*, 94 U.S.P.Q.2d 1031.

Indeed, this promotional document only supports Elevation's motion based on lack of use as a service mark as of the filing of the application. Importantly, the document itself

(a) acknowledges a "major bug" discovered in the prior beta test; (b) notes that "after bug-hunting for two weeks we believe we've fixed the...problem...;" (c) calls for more "beta testers" to test out the bug fix; and (d) references a "public launch in December...."

Similarly, the final document proffered also only substantiates a further promotional use. The page acknowledges that the "Beta-Test Has Closed," again references technical difficulties and notes "[t]o stay informed about our official launch enter your information below," without demonstrating any use of the mark for any online educational content. Dillard Decl., Ex. B, screen shot 3. Indeed, although the screen shot speaks for itself, Mr. Dillard, in his declaration, describes this screenshot as "a notice window ... which allowed visitors to the site ... to provide us with information so we could contact them with information about the subsequent official public launch of the site...." *Id.*, ¶ 10 (Emphasis added). Allowing people to sign up for information about a future public launch does not amount to use of the applied-for designation in commerce for online educational content of any type, let alone the type defined in the Application.

As discussed in Elevation's motion, to justify a registration, an applicant needs to be offering the applied-for services under the applied-for designation at the time of filing its Application. *In re Port Auth. of N.Y.*, 3 U.S.P.Q.2d 1453 (T.T.A.B. 1987) (finding advertising, promotion and preparatory activities for services before the services were available insufficient to support registration); *In re Cedar Point, Inc.*, 220 U.S.P.Q. 553 (T.T.A.B. 1983) (holding that advertising of an entertainment park, which was not yet open, was not a valid basis for registration). No such use has been established here. Furthermore, this document, like the others, is only admissible for what it shows on its face, and not as proof of any facts asserted therein. The document does not prove any beta test actually took place or the nature of the beta test. T.B.M.P. §§ 528.05(e), 708; *Safer*, 94 U.S.P.Q.2d 1031.

Applicant has failed to introduce any admissible evidence demonstrating that Applicant actually used the applied-for THE ELEVATION GROUP designation for the services described in its amended Application as of the filing date of the Application. If anything, Applicant's so-called evidence only confirms that as of November 8, 2010 there was no use of the designation THE ELEVATION GROUP for the applied-for online educational services. Under these circumstances, no disputed issue of material fact has been established, making summary judgment entirely appropriate here.

CONCLUSION

For each of the foregoing reasons and those set forth in Elevation's opening brief supporting its Motion for Summary Judgment, Elevation respectfully requests that its Motion for Summary Judgment be granted and that its opposition to the Application be sustained on the ground of lack of use of the applied-for designation at the time the Application was filed.

Dated: July 1, 2013

Respectfully submitted,
MORGAN, LEWIS & BOCKIUS, LLP

By: /s/RDA
Rochelle D. Alpert
Attorney for Opposer
Elevation Management, LLC

Rochelle D. Alpert
Stephanie L. Hall
Morgan, Lewis & Bockius, LLP
One Market, Spear Street Tower
San Francisco, CA 94105
Telephone: (415) 442-1326
Facsimile: (415) 442-1001
Email: ralpert@morganlewis.com
shall@morganlewis.com

APPENDIX A

OPPOSER'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

APPENDIX A

Decl. ¶	Statements or Documents to be Stricken	Grounds of Evidentiary Objection
3	In or about 2010, Finish Strong first became interested in using the designation and "d/b/a" business name "The Elevation Group" in connection with its online educational services.	▪ Irrelevant ▪ No indication of use as a service mark ▪ No specific factual information as to first use in commerce for the applied-for services
3	In order to do so, we purchased the domain name theelevationgroup.net on or about March, 2010 …	▪ Irrelevant ▪ No indication of use as a service mark ▪ No specific factual information as to first use in commerce for the applied-for services
3	… and later, in March, 2011, purchased the additional domain name theelevationgroup.com.	▪ Irrelevant (after the filing of the application) ▪ No indication of use as a service mark ▪ No specific factual information as to first use in commerce for the applied-for services
4	The idea behind The Elevation Group was, and is to conduct webinars, and host and provide other educational services to persons interested in the financial industry, investing, or starting a home business.	▪ Irrelevant ▪ No indication of use as a service mark ▪ Conclusory ▪ Vague and ambiguous ▪ No specific factual information as to first use in commerce for the applied-for services
4	The published content in particular is focused on the financial and investing tactics and strategies used by successful, wealthy individuals.	▪ Irrelevant ▪ No statement of date ▪ Lack of foundation ▪ Best evidence rule ▪ Vague and ambiguous ▪ No specific factual information as to first use in commerce for the applied-for services ▪ Conclusory

Decl. ¶	Statements or Documents to be Stricken	Grounds of Evidentiary Objection
4	In order to do so, we constructed and introduced a website, accessed at the time on the Internet at www.theelevationgroup.net, to host, promote, advertise, and provide the webinars and services.	▪ No date attached to the construction of the site, the introduction of the site, or the hosting, promotion, advertisement or provision of webinars and services. ▪ Lacking factual specification ▪ Vague and ambiguous ▪ Lack of foundation ▪ Best evidence rule ▪ Conclusory ▪ Irrelevant
5	Initially, we "beta tested" the website to gauge public interest. That beta test of The Elevation Group was launched and operational on the Internet and made available on or before October 22, 2010 to those members of the public who had subscribed prior to a cut-off date to access the site.	▪ No indication of use as a service mark ▪ Lack of factual specification ▪ Vague and ambiguous ▪ Lack of foundation ▪ Best evidence rule ▪ Conclusory ▪ Irrelevant
6	Attached hereto as Exhibit A is a true and correct copy of an "email blast" – an email announcement sent to a group of recipients – announcing on October 21, 2010 to the beta test subscribers to our The Elevation Group website that the official launch of the website was coming the following day, on October 22, 2010, at 8:00 pm, Central Standard Time.	▪ Mischaracterizes document as announcing the "official launch" when document references only a "private beta launch" ▪ Best evidence ▪ Argumentative ▪ No indication of use as a service mark ▪ Vague and ambiguous ▪ Irrelevant ▪ Lack of foundation ▪ No indication of being an email on face of the document
Ex. A	Ex. A	▪ No indication of use as a service mark ▪ Features a different mark than applied for, namely THE ELEVATION GROUP.NET ▪ Improper authentication of document as an online publication or otherwise. TMEP 528.05(e) ▪ Irrelevant ▪ Lack of foundation ▪ Hearsay

Decl. ¶	Statements or Documents to be Stricken	Grounds of Evidentiary Objection
7	The following day, on October 22, 2010, at 8:00 pm, Central Standard Time, the beta-test launch of our website commenced exactly as planned and announced.	▪ Conclusory ▪ No indication of use as a service mark ▪ Vague and ambiguous ▪ Lack of foundation ▪ Lack of factual specification ▪ Contradicted by later statements in the declaration and screen shot 2 (Ex. B), which states that there was a "bug" during the launch. ▪ Best evidence rule ▪ Argumentative ▪ Irrelevant ▪ Hearsay
8	Attached hereto as Exhibit B are true and correct copies of three (3) additional screen captures from our The Elevation Group website as those screens appeared in 2010.	▪ No statement of specific date on or before November 8, 2010. ▪ No indication of use as a service mark ▪ Vague and ambiguous ▪ Irrelevant ▪ Conclusory ▪ Improper authentication of document as an online publication or otherwise. TMEP 528.05(e).
8	The first screen shot shows a page on which we advertised the prices for subscription memberships to The Elevation Group. This screen shows our prominent use of our THE ELEVATION GROUP trademark on the website, here both in two separate logo forms and in plain text. This web page was viewable by subscribers to the beta test as of October 22, 2010.	▪ Irrelevant ▪ No indication of use as a service mark ▪ Conclusory ▪ Irrelevant. ▪ Mischaracterizes the document ▪ Argumentative ▪ Best evidence ▪ Lack of foundation ▪ Improper authentication of document as an online publication or otherwise. TMEP 528.05(e).

Decl. ¶	Statements or Documents to be Stricken	Grounds of Evidentiary Objection
Ex. B, screen shot 1	Ex. B, Screen Shot 1	▪ No indication of use as a service mark. ▪ Improper authentication of document as an online publication or otherwise. TMEP 528.05(e) ▪ Irrelevant ▪ Hearsay ▪ Improper authentication of document as an online publication or otherwise. TMEP 528.05(e).
9	The second screen of Exhibit B shows a web page from the website, posted approximately two weeks after the beta test, which describes the success of the initial beta test, announces a second 24-hour "bug fix" beta test available for an additional fee, and also announces the public launch date (as opposed to the beta test) for the site.	▪ Irrelevant ▪ Conclusory ▪ Inconsistent with the documents statement that there was a "bug" during the launch ▪ Argumentative ▪ No indication of use as a service mark ▪ Best evidence rule ▪ Lack of foundation ▪ Improper authentication of document as an online publication or otherwise. TMEP 528.05(e).
9	This screen again shows prominent use of THE ELEVATION GROUP on the website, in both logo form and in plain text.	▪ No indication of use as a service mark. ▪ Conclusory ▪ Vague and ambiguous ▪ Irrelevant. ▪ Argumentative ▪ Mischaracterizes the document: The logo here is not comprised of the applied-for mark, but rather is comprised of the designation "THE ELEVATION GROUP.NET" ▪ Best evidence rule ▪ Lack of foundation

Decl. ¶	Statements or Documents to be Stricken	Grounds of Evidentiary Objection
Ex. B, Screen Shot 2	Ex. B, Screen Shot 2	▪ No indication of use as a service mark ▪ Argumentative ▪ The logo here is not comprised of the applied-for mark, but rather is comprised of the designation "THE ELEVATION GROUP.NET" ▪ Improper authentication of document as an online publication or otherwise. TMEP 528.05(e). ▪ Date-stamp inconsistent with the document itself and statements in the Declaration indicating it is from two weeks after October 22, 2010 – i.e., from *November*.
10	The third screen [shot] of Exhibit B is a notice window from the website as it appeared in October, 2010, which allowed visitors to the site who missed the beta test subscription period to provide us with information so we could contact them with information about the subsequent "official" launch of the site.	▪ Irrelevant ▪ No indication of use as a service mark ▪ Mischaracterizes the document ▪ Best evidence rule ▪ Vague and ambiguous ▪ No specific facts
10	Again, our mark THE ELEVATION GROUP appeared prominently on this page, which was posted and available as of October 22, 2010, in both logo and plain text form.	▪ Irrelevant ▪ No indication of use as a service mark ▪ Conclusory ▪ Argumentative ▪ Mischaracterizes the document: The logo here is not comprised of the applied-for mark, but rather is comprised of the designation "THE ELEVATION GROUP.NET" ▪ Best evidence rule ▪ Lack of foundation

Decl. ¶	Statements or Documents to be Stricken	Grounds of Evidentiary Objection
Ex. B, Screen Shot 3	Ex. B, Screen Shot 3	▪ Irrelevant ▪ No indication of use ▪ The logo here is not comprised of the applied-for mark, but rather is comprised of the designation "THE ELEVATION GROUP.NET" ▪ Improper authentication of document as an online publication or otherwise. TMEP 528.05(e).
11	On November 8, 2010, Finish Strong filed an application to register THE ELEVATION GROUP as a trademark for web-based educational services. As of that filing date, the Elevation Group website was still online and operational. Since we were using our Mark THE ELEVATION GROUP on and in connection with the beta test website as of filing date, Finish Strong filed its Application as a "use-based" application.	▪ Conclusory ▪ Argumentative ▪ No specific facts ▪ No indication of use as a service mark ▪ Best evidence ▪ Lack of foundation ▪ Vague and ambiguous ▪ Lack of specific facts ▪ Irrelevant
11	Since we were using our Mark THE ELEVATION GROUP on and in connection with the beta test website as of filing date, Finish Strong filed its Application as a "use-based" application	▪ Conclusory ▪ Argumentative ▪ Irrelevant ▪ No indication of use as a service mark ▪ Lack of specific facts ▪ Vague and ambiguous
12	Our attorney at the time accessed the website to print a screen shot, which I believe showed use of the Mark on a page from the website, and submitted the screen shot to the U.S. Patent and Trademark Office ("PTO") with the Application as a "specimen of use" together with my statement of use attesting to the fact that Finish Strong had been using THE ELEVATION GROUP in commerce in connection with its web-based services since at least October 22, 2010.	▪ Irrelevant ▪ Hearsay ▪ Conclusory ▪ Argumentative as to beliefs and his actions ▪ Mischaracerizes the application , which was signed only by the attorney.

Decl. ¶	Statements or Documents to be Stricken	Grounds of Evidentiary Objection
13	As originally filed, our application stated that the services Finish Strong was designating in connection with the Mark were to be International Class 41: Wb-based subscription educational services in the areas of financial strategies and techniques utilized by high net worth individuals." In or about August, 2011, however, the PTO requested that Finish Strong amend the application, including by changing its designation of services, as a condition to registration.	▪ Irrelevant
14	In or about February, 2012, Finish Strong amended its designation of services to seek registration for a more specifically defined set of educational services. The PTO did not, however, at any time request that we provide a new specimen of use to accompany our re-stated services designation. On or about February 19, 2012 the PTO notified us that our application had been approved for publication on the Principal Register.	▪ Irrelevant
15	Although the website has changed since its inception as the original beta-test site in October, 2010, and additional sites have been created and are online, Finish Strong has continued to use it's the ELEVATION GROUP Mark on, and in connection with subscription based educational services offered, promoted, provided, and/or advertised on websites located at www.theelevationgroup.com, www.theelevationgroup.net, and www.mikedillard.com.	▪ Conclusory ▪ Argumentative ▪ No statement of date ▪ Vague and ambiguous ▪ Best evidence rule ▪ Lack of foundation ▪ Lack of specific facts ▪ Irrelevant

CERTIFICATE OF SERVICE

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is One Market, Spear Street Tower, **San Francisco**, CA 94105.

On **July 1, 2013**, I served the within documents:

- **OPPOSER'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT;**
- **APPENDIX A**

X **(BY MAIL)** I placed the sealed envelope(s) for collection and mailing by following the ordinary business practices of Morgan, Lewis & Bockius LLP, **San Francisco**, California. I am readily familiar with the firm's practice for collecting and processing of correspondence for mailing with the United States Postal Service, said practice being that, in the ordinary course of business, correspondence with postage fully prepaid is deposited with the United States Postal Service the same day as it is placed for collection.

☐ **(BY OVERNIGHT DELIVERY)** I placed the sealed envelope(s) or package(s) designated by the express service carrier for collection and overnight delivery by following the ordinary business practices of Morgan, Lewis & Bockius LLP, **San Francisco**, California. I am readily familiar with the firm's practice for collecting and processing of correspondence for overnight delivery, said practice being that, in the ordinary course of business, correspondence for overnight delivery is deposited with delivery fees paid or provided for at the carrier's express service offices for next-day delivery the same day as the correspondence is placed for collection.

☐ **(BY EMAIL)** by transmitting via electronic mail the document(s) listed above to each of the person(s) as set forth below.

Robert B. Golden
Lackenbach Siegel LLP
Lackenbach Siegel Building,
One Chase Road
Scarsdale, NY 10583-4165

Executed on **July 1, 2013**, at **San Francisco**, California. I declare under penalty of perjury, under the laws of the United States of America, that the foregoing is true and correct.

Yelena Lolua

Yelena Lolua